

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

RESPONDENT . C.A. NO. H-05-3849
DEBRA M. BACON . HOUSTON, TEXAS
VS. .
MOVANT .
CITIGROUP GLOBAL MARKETS INC. .
formerly known as . SEPTEMBER 8, 2010
Salomon Smith Barney Inc. . 10:00 A.M. to 11:26 A.M.

TRANSCRIPT of HEARING
BEFORE THE HONORABLE LYNN N. HUGHES
UNITED STATES DISTRICT JUDGE

APPEARANCES:

FOR THE RESPONDENT: MR. DANIEL R. KIRSHBAUM
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5300 Memorial
Suite 700
Houston, Texas 77007

MR. BRADEN W. SPARKS
Braden W. Sparks PC
8117 Preston Road
Suite 800
Dallas, Texas 75225

FOR THE MOVANT: MR. ANDREW R. HARVIN
MS. N. KIMBERLY HOESL
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Proceedings recorded by mechanical stenography, transcript
produced by computer-aided transcription.

APPEARANCES CONTINUED

OFFICIAL COURT REPORTER:

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P R O C E E D I N G S

THE COURT: Thank you. Be seated.

Good morning.

MR. KIRSHBAUM: Good morning, Your Honor.

MR. HARVIN: Good morning, Your Honor.

THE COURT: Mr. Sparks, is it Bacon's position that she stands by all the representations in the record, about her representations about what's in the record?

MR. SPARKS: I'm not sure I understand your question, Your Honor.

THE COURT: If Mr. Harvin can point out factual recitations presented by Bacon that are not contained in the record, then Bacon would concede she has done something seriously wrong?

MR. SPARKS: Your Honor, I'm not sure I understand the Court's question. I don't believe -- I'm not aware of anything that Bacon has alleged or that I've alleged on Bacon's part --

THE COURT: I have a question. My question is: Does Bacon stand by the factual recitations about what is in the arbitration record that are made in her papers?

MR. SPARKS: Bacon stands by her pleadings and her references to the record.

THE COURT: All right. Would you show me where the panel says it relied on New York law?

MR. SPARKS: There's no reference by the panel to that

1 effect, but the contract between the parties is a New York
2 contract and that's in the record. I believe it was Exhibit
3 No. 7, Your Honor. I identified that many times in my papers.

4 *THE COURT:* Well, that's slightly different from
5 saying that the panel said something about relying on it, isn't
6 it?

7 *MR. SPARKS:* I believe it's Document No. 7, Exhibit
8 38. Your Honor, what I've said all along is that the record
9 supports the inference that the panel applied New York law
10 because there is a contract in the record that is a New York
11 law, that says that New York law applies.

12 *THE COURT:* Well, Mr. Sparks, the problem here is that
13 Citigroup -- is that still its name?

14 *MR. HARVIN:* Yes, Your Honor.

15 *THE COURT:* Okay. There's been a lot of aliases and
16 things adopted here in the last couple of years. Citigroup
17 says that there are things in the record that contradict the
18 decision and there are things relied on that are not in the
19 record or not relevant, roughly. That's not what it said, but
20 that a contract that calls for New York law is -- in the record
21 does not mean they're relying on it. Now, that's -- but the
22 problem here is the reasonable suspicion of Citigroup that the
23 decision here was arbitrary.

24 *MR. SPARKS:* I didn't understand that last word, Your
25 Honor, I'm sorry.

1 *THE COURT:* Arbitrary. It's not your hearing. It's
2 my mumbling.

3 The fact that Bacon received no benefit from the
4 funds, how did she receive no benefit from the funds?

5 *MR. SPARKS:* Your Honor, I don't believe I've ever
6 argued that she received no benefit from the funds. What I've
7 argued is that the record supports an inference that the panel
8 could rationally have concluded that she had no control over
9 the funds, that she did not personally exercise control over
10 the funds, that she had --

11 *THE COURT:* That's what happens when you let other
12 people do it, isn't it? I'm more interested just in the
13 concept that she had no benefit. It was her business.

14 *MR. SPARKS:* I think what the evidence -- what the
15 record shows, Your Honor, is that there were over \$900,000 in
16 damages that the panel could have found.

17 *THE COURT:* No, I'm sorry, we're going to talk about
18 what I want to talk about.

19 *MR. SPARKS:* I'm trying to, Your Honor. I apologize.

20 *THE COURT:* Was she an officer of the business?

21 *MR. SPARKS:* Yes, sir.

22 *THE COURT:* Is she a part owner of the business?

23 *MR. SPARKS:* Yes, sir.

24 *THE COURT:* Was she a partner of the other person
25 involved in the business?

1 *MR. SPARKS:* I'm not sure if she was a partner, Your
2 Honor, but I just don't recall from the record. I think she
3 was an officer in the entity.

4 *THE COURT:* Well, no, not -- I didn't ask if she was a
5 partner in the entity. She was a partner of the other
6 principal in the business, her husband. Isn't that true?

7 *MR. SPARKS:* I suppose one could arrive at that
8 conclusion, Your Honor.

9 *THE COURT:* Where were they domiciled?

10 *MR. SPARKS:* I believe they were domiciled in North
11 Carolina.

12 *THE COURT:* That's my recollection.

13 *MR. HARVIN:* South Carolina, I believe.

14 *THE COURT:* Same thing. And I take it it's not a
15 community property state?

16 *MR. HARVIN:* I'm not exactly sure.

17 *THE COURT:* We'll know in a minute.

18 All of the money that had been invested in the
19 business by either of the Bacons had come from property that
20 had been earned during the marriage?

21 *MR. SPARKS:* Your Honor, without going back and
22 looking at the record, I couldn't aver to the Court that that's
23 true, but it certainly stands to reason.

24 *THE COURT:* Well, my recollection is that both of them
25 had good jobs and when they took retirement, they took their --

1 that's my recollection, but that's my recollection.

2 *MR. SPARKS:* That's true.

3 *THE COURT:* And they earned it in Texas, right?

4 *MR. SPARKS:* Well, I'm not sure. No, I don't believe
5 they did earn it in Texas, because there was a pizza business
6 in South Carolina, as I recall.

7 *THE COURT:* That's not what they retired from.

8 *MR. SPARKS:* Well, her retirement funds were from her
9 employment with, I believe, with BP.

10 *THE COURT:* And his were from something similar,
11 weren't they?

12 *MR. SPARKS:* And hers were exempt as were her
13 retirement funds and they were in her sole and separate
14 retirement account.

15 *THE COURT:* They were earned during the existence of
16 the marriage.

17 *MR. SPARKS:* Your Honor, I honestly don't know whether
18 they were earned during the pendency of the marriage or not.

19 *THE COURT:* How long were they married?

20 *MR. SPARKS:* I don't recall.

21 *THE COURT:* Do you recall?

22 *MR. SPARKS:* Probably about 20 years, 20 or 25.

23 *THE COURT:* And what was the face value of the
24 disputed transactions?

25 *MR. SPARKS:* The checks were -- the face value of the

1 checks were \$218,000.

2 *THE COURT:* And what was the amount of damages claimed
3 by Bacon?

4 *MR. SPARKS:* There was testimony over -- by three
5 witnesses over several hours regarding what could be construed
6 as damages. And I think the issue is --

7 *THE COURT:* Well, now, wait. Tell me what that means.
8 What could be construed?

9 *MR. SPARKS:* Well, I think the issue, Your Honor, is
10 whether -- is what the panel reasonably may have --

11 *THE COURT:* No, sir, I'm asking you a question.

12 *MR. SPARKS:* I'm trying to answer it.

13 *THE COURT:* No, you're not. I want to know what her
14 damages were. Don't tell me that it's something that Oprah
15 would have thought were damages or the panel thought were
16 damages. What harm did she suffer besides the loss of the
17 funds?

18 *MR. SPARKS:* There was testimony in the record that
19 she and her husband lost \$515,000, approximately, in business
20 losses. There was testimony --

21 *THE COURT:* Well, wait. What does that have to do
22 with the checks?

23 *MR. SPARKS:* There was testimony that there was
24 \$360,000 lost from Randall's misuse of accounts at Salomon
25 Smith Barney. \$218,000 of that was the checks in issue.

1 *THE COURT:* 280?

2 *MR. SPARKS:* 218. 218.

3 *THE COURT:* \$218,000 of unauthorized withdrawals?

4 *MR. SPARKS:* There's testimony that there was --

5 *THE COURT:* Wait, wait. Is that right?

6 *MR. SPARKS:* \$218,000 of unauthorized withdrawals that
7 were the subject of the arbitration, yes, Your Honor.

8 *THE COURT:* Okay.

9 *MR. SPARKS:* There were other unauthorized
10 withdrawals.

11 *THE COURT:* Okay. But that's not part of the
12 arbitration.

13 *MR. SPARKS:* It was in the record, yes, sir.

14 *THE COURT:* A man in a car wreck that is arbitrated
15 could have had other accidents, couldn't he? But if they're
16 not part of the arbitration, they're not -- can't be part of
17 the damages.

18 Louisiana is the easternmost community property
19 state. Texas would be next.

20 Explain to me how Smith Barney is responsible on
21 an arbitration under that account for losses in the business,
22 which you mentioned 518 or five hundred and some odd thousand
23 dollars of losses in the business.

24 *MR. SPARKS:* I believe those losses preceded what
25 happened with Smith Barney. I don't believe Smith Barney is --

1 in my personal view, I don't believe Smith Barney is
2 responsible for those losses.

3 *THE COURT:* So, why did Bacon present evidence about
4 those losses, unless it's just background?

5 *MR. SPARKS:* Because I believe it's rationally
6 inferable from the facts, Your Honor, that the panel could have
7 concluded that the damages were in excess of the \$218,000.

8 *THE COURT:* How? How?

9 *MR. SPARKS:* By looking at the damages that were in
10 the record, including the \$360,000 in the property settlement
11 agreement of divorce that included the \$218,000, by looking at
12 the \$82,000 in additional taxes and penalties that they had to
13 pay as a result of the withdrawal of the 218,000, by looking at
14 \$36,000 in interest, as well as the 515,000, Your Honor.

15 *THE COURT:* Well, the interest -- the lost interest,
16 ignore that, because that's -- that only makes you whole for
17 the 218. If somebody else has your 218 for a couple of years,
18 you get the interest.

19 How is a loss on other things a loss on this
20 account?

21 *MR. SPARKS:* Well, I think the issue before the panel,
22 Your Honor, if I may answer it in that manner, the question is
23 whether or not the panel could have allocated if the conclusion
24 is that Texas law applied. And I believe that the panel could
25 have allocated if they concluded that \$218,000 was the

1 responsibility of Salomon Smith Barney, but that Randall had
2 either used those moneys or had created other losses or caused,
3 I should say, other losses to Mrs. Bacon, as indicated by the
4 property settlement agreement which indicated \$360,000 worth of
5 damages. And just on that basis alone, it could be --

6 *THE COURT:* So, by a post-train wreck agreement, the
7 malefactor, Randall Bacon, I'm assuming, can agree with his
8 victim, I'm assuming, to increase Smith Barney's
9 responsibility? Is that what you're telling me?

10 *MR. SPARKS:* No, sir.

11 *THE COURT:* Well, that sounds like what you just told
12 me.

13 *MR. SPARKS:* No, sir. What I'm saying is that it's a
14 rational inference that the panel could have allocated the
15 \$218,000 out of \$360,000, that the property settlement
16 agreement indicated that Randall was responsible for by
17 misusing the Smith Barney accounts.

18 *THE COURT:* Counsel, you cannot do that. I don't
19 recall this argument from before. That an after the fact
20 agreement between the wrongdoer and the victim for alternative
21 purposes increases the liability for wrongful dishonor. Make
22 it a simple transaction. This was a wrongful honoring.

23 *MR. SPARKS:* Well, I don't agree with the Court's
24 statement of the sequence of events or the legal principles,
25 with all do respect, Your Honor. I think it's you have a

1 property settlement agreement between a husband and wife in
2 which they agree that he misused her accounts and that that
3 resulted in \$360,000 in damages. She then brings an
4 arbitration against Salomon Smith Barney.

5 *THE COURT:* I know those facts, counsel. Stick to the
6 point. Tell me what law. First, you disagree with my
7 chronology. Randall takes money out of the account.

8 *MR. SPARKS:* No, I don't disagree that Randall took
9 money out of the account, Your Honor.

10 *THE COURT:* All right. After that it went into the
11 business. The business failed, the next thing that happened;
12 is that right?

13 *MR. SPARKS:* I can't address the relationship between
14 when the business failed candidly, Your Honor, because I'm not
15 sure that some of those damages hadn't already occurred. I
16 believe that many of the business damages had already occurred
17 before that.

18 *THE COURT:* As an economic proposition the business
19 had probably failed a year before. But as a functional matter,
20 when did the business close?

21 *MR. SPARKS:* I don't know, Your Honor.

22 *THE COURT:* It was after the checks; is that right?

23 *MR. SPARKS:* That's probably true, yes, Your Honor.

24 *THE COURT:* And then when was the divorce petition?

25 *MR. SPARKS:* I would have to look, Your Honor. I

1 don't know.

2 *THE COURT:* But it was after the business closed?

3 *MR. SPARKS:* Yes -- well, it was after the checks were
4 written and she discovered that they had been forged. I don't
5 know if that was before or after the business closed.

6 *THE COURT:* When was the arbitration in relation to
7 the divorce?

8 *MR. SPARKS:* After the divorce, Your Honor.

9 *THE COURT:* And was the contract -- after the divorce
10 was finished. So, the contract is before the arbitration?

11 *MR. SPARKS:* Which contract are you referring to, Your
12 Honor?

13 *THE COURT:* The contract between husband and wife
14 allocating --

15 *MR. SPARKS:* The property settlement agreement?

16 *THE COURT:* Whatever --

17 *MR. SPARKS:* That's what the name of the document that
18 they used to settle their property settlement disputes in
19 divorce was called the property settlement agreement.

20 *THE COURT:* And where did they get divorced? In South
21 Carolina?

22 *MR. SPARKS:* I believe so, Your Honor.

23 *THE COURT:* Do you know?

24 *MR. HARVIN:* I believe that's right, Your Honor.

25 *THE COURT:* All right. The chronology seems to be

1 just what I said. There's a train wreck where Randall takes
2 money out of the account. There's a divorce by which Randall
3 and Bacon agree on what all of these damages were.

4 *MR. SPARKS:* Well, that's not quite accurate, Your
5 Honor. They agreed that there was \$360,000 in funds that were
6 wrongfully taken by Randall from Debra's accounts. It's not
7 clear, as I recall, which accounts it was and they didn't
8 discuss the \$218,000 that were removed by forgery and, of
9 course, Salomon Smith Barney --

10 *THE COURT:* How were the others wrongfully taken if
11 the 218 was by forgery?

12 *MR. SPARKS:* Well, the record indicates that they were
13 wrongfully taken by Randall, but it is not specific as to how
14 it happened.

15 *THE COURT:* No, I'm sorry, by the record, you mean the
16 consensual arrangement between the spouses?

17 *MR. SPARKS:* By the record, Your Honor, I mean the
18 record in the arbitration that includes the property settlement
19 agreement that discusses the issues.

20 *THE COURT:* Is there any evidence of what that
21 wrongful taking consists of other than the agreement?

22 *MR. SPARKS:* I don't believe that there is, but the
23 agreement says that it was wrongfully taken from the accounts.

24 *THE COURT:* And we're back to what I said. After the
25 train wreck, the two people involved in the train wreck get

1 together and agree on an amount of damages which then Bacon
2 says a third party owes. There is no fact in the agreement.
3 There is a conclusion that he confesses to. But there's
4 nothing to indicate that money ever came out of the account in
5 which the claim was being arbitrated.

6 Yes, sir.

7 *MR. SPARKS:* I'm not sure that that's an accurate --

8 *THE COURT:* But tell me where it is, counsel.

9 *MR. SPARKS:* Well, I think where it is is that the
10 accounts, I believe -- it's been a long time, Your Honor, and I
11 apologize, but it's been a long time since I looked at that
12 property settlement agreement. I think I may have a copy here.
13 But as I recall, to the best of my recollection, there was a
14 property settlement agreement that specified the accounts, the
15 names and numbers on the accounts.

16 *THE COURT:* That's not what you just told me a minute
17 ago, and I don't recall ever having read it, but if I had, I
18 would have forgotten by now. You told me there was no
19 recitation in there. It was just a statement about they agreed
20 on these losses.

21 *MR. SPARKS:* I apologize, Your Honor. There was no
22 statement --

23 *THE COURT:* Mr. Harvin, do you know whether it's in
24 there?

25 *MR. SPARKS:* Your Honor, there was no statement as to

1 exactly how it was wrongfully taken. There was a statement
2 that it was wrongfully taken. I don't remember the exact terms
3 of art, but it was to the effect that he abused her accounts or
4 misused the money in her accounts or wrongfully took the money.
5 The account numbers I believe were listed. They were her
6 accounts. The total was \$360,000. There was nothing in the
7 property settlement agreement that discussed the fact that
8 \$218,000 of that was from forgeries, but there is no way to say
9 that it is clear from that property settlement agreement that
10 that \$360,000 did not come from the accounts that were
11 discussed in arbitration and there is a lot of --

12 *THE COURT:* Well, other than the withdrawals presented
13 were the 218.

14 *MR. SPARKS:* The only forged withdrawals were the 218.

15 *THE COURT:* But before you can't prove something by
16 saying, okay -- you're like the prosecutor who says, well, we
17 proved he robbed this bank, so there are another nine robbed
18 banks that we don't know what happened, so he must have done
19 them. Do you know whether there was anything --

20 *MR. HARVIN:* I believe that Mr. Sparks' recitation
21 about the settlement agreement is correct. But at the
22 arbitration hearing, and it was conceded by all parties, that
23 the amount of the unauthorized checks were 218,000. I do know
24 that Mr. Bacon, Randall Bacon, agreed in the settlement
25 agreement to repay a sum of \$360,000, but there was no evidence

1 that any sum more than \$218,000 was withdrawn improperly by any
2 unauthorized withdrawal.

3 *MR. SPARKS:* I would disagree with that last part,
4 Your Honor, because while it was true that there was nothing in
5 the property settlement agreement that indicated that more
6 than -- well, that any amount other than \$360,000 was
7 improperly withdrawn, I don't believe there was any description
8 as to how it was withdrawn. I think what happened at the
9 arbitration is that everybody agreed that there was 214,000 --
10 \$218,000 in forged instruments and everybody agreed that that's
11 what the arbitration was about. But I don't think that
12 constrains the panel from considering other damages that they
13 may have felt Randall was responsible for.

14 *THE COURT:* It's not about feelings, counsel. It's
15 about a contract.

16 *MR. SPARKS:* Your Honor, if the issue is whether or
17 not the panel --

18 *THE COURT:* What does Texas law say about forgery?
19 What are the damages for forgery?

20 *MR. SPARKS:* Well, I apologize, Your Honor, but I
21 don't know -- I believe that the amount of damages -- I don't
22 know. I can't --

23 *MR. HARVIN:* Well, 4.406 of the Texas Business and
24 Commerce Code says that it's the amount of the unauthorized
25 withdrawal provided there has been timely notice given to the

1 bank.

2 *THE COURT:* I know about your defenses, but you don't
3 get emotional distress.

4 *MR. HARVIN:* No, and none of that was ever pled for.

5 *THE COURT:* Business opportunities you might get
6 interest on, like any other pecuniary --

7 *MR. HARVIN:* Perhaps.

8 *THE COURT:* -- amount.

9 *MR. SPARKS:* Well, my point, Your Honor, is I believe
10 that the testimony at the hearing involved all withdrawals.
11 Randall was present. He testified about it.

12 *THE COURT:* How much is collusive corroboration with
13 no specifics worth? That's not evidence.

14 *MR. SPARKS:* I believe it is, Your Honor.

15 *THE COURT:* I know you believe it is.

16 *MR. SPARKS:* Yes, sir.

17 *THE COURT:* That wasn't the question.

18 *MR. SPARKS:* Yes, sir.

19 *THE COURT:* You have no specifics. It wasn't pleaded.
20 And it's not recoverable when you claim -- you've got to prove
21 the wrongful withdrawal. And at no point in the arbitration
22 were there drafts identified and presented and the dates so
23 that whatever defenses could apply.

24 *MR. SPARKS:* There was testimony, Your Honor, I
25 believe, about the other losses. There certainly was a

1 property settlement agreement in the record that could
2 consider --

3 *THE COURT:* Counsel --

4 *MR. SPARKS:* Yes, sir.

5 *THE COURT:* -- we have discussed the property
6 settlement agreement. It is evidence of an understanding
7 reached after the fact between two parties to solve their
8 differences. It is not a fact about banking practices two
9 years earlier.

10 *MR. SPARKS:* Well, Your Honor, I would respectfully
11 disagree with the facts.

12 *THE COURT:* Quit saying that. You're paid to disagree
13 when I say something that's averse to your client. Just tell
14 me what the better fact or reasoning is.

15 *MR. SPARKS:* Well, I believe that the property
16 settlement agreement has facts that the panel could have
17 considered. I believe that the statements in there are facts.

18 *THE COURT:* Well, they're facts of the assertion,
19 counsel, and they're a binding term between the parties, but
20 it's not original data.

21 Mr. Harvin, do you have the agreement handy?

22 *MR. HARVIN:* I do not, Your Honor.

23 *THE COURT:* Do we think it's somewhere in the volumes
24 of the record?

25 *MR. HARVIN:* Oh, yes, sir.

1 *THE COURT:* Anybody have an idea where?

2 *MR. SPARKS:* Where it is in the record, Your Honor?

3 *THE COURT:* Yes.

4 *MR. SPARKS:* I know it was in the record, because the
5 entire arbitration record was placed before the Court, but I
6 can't tell you exactly where, I'm sorry.

7 *MR. HARVIN:* We can locate it and give you a cite.

8 *THE COURT:* How long is it?

9 *MR. SPARKS:* It's not long. It's about five or six
10 pages.

11 *THE COURT:* Apparently it's an exhibit to 7, so she'll
12 go get it.

13 *MR. HARVIN:* Thank you.

14 *MR. SPARKS:* Your Honor, is it all right if I sit down
15 while she's getting it?

16 *THE COURT:* Yes, sir.

17 Actually Wisconsin is the community property
18 state next. It's more easterly than Louisiana by about half.

19 All right. Mr. Harvin, do you have anything you
20 want to direct my attention to or correct?

21 *MR. HARVIN:* Nothing other than on the -- well, I may
22 be just repeating what Your Honor already knows from the
23 papers. I think our position is well-set out in the papers. I
24 believe that this has been an effort to rewrite the case
25 under -- in certain circumstances a new record and under a new

1 law, New York law, in order to avoid the responsibility of the
2 panel to apportion liability and I --

3 *THE COURT:* Well, what's New York law say?

4 *MR. HARVIN:* What does New York law say?

5 *THE COURT:* Yes.

6 *MR. HARVIN:* The New York law provides, as Mr. Sparks
7 has briefed, that in the event that the bank is -- there's
8 liability against the bank for the failure to review the
9 signatures and there's essentially strict liability with no
10 need to apportion responsibility and that's why this New York
11 law has been brought forth for the first time at this stage in
12 the proceedings. But it was never pled. It was never argued.
13 It was never presented to the panel. And, in fact, the
14 claimant in this case specifically pled Texas law and the
15 Business and Commerce Code, which we presented defenses under.

16 With respect to the various numbers, it's our
17 position that the \$218,000 is the only figure that was
18 presented as a principal loss in the arbitration. I will not
19 repeat what the Court has obviously analyzed with respect to
20 the settlement agreement, but this idea that there was \$900,000
21 potential liability is just off the charts. It was never
22 mentioned in the hearing. It includes \$515,000 in business
23 losses that the Bacons had without regard to Smith Barney's
24 involvement that they willingly assumed.

25 And then there is this hypothetical damage model

1 that the panel arrived at a \$478,000 number and then allocated
2 it 55/45 split and there's no support for that number in the
3 first place. That number is never mentioned in the record.
4 And the 55/45 split doesn't even get you to \$218,000. It gets
5 you to different numbers, as we briefed. So, we believe that
6 that there is a serious misrepresentation of the record.

7 And I need to point out to Your Honor that as a
8 result of what we tried to point out to Bacon's counsel, that
9 three of the statements were withdrawn, but they stuck to the
10 New York law statement. They stuck to the idea that there were
11 these various hypothetical damage models for which there's
12 nothing in the record to support and we just couldn't allow
13 that to go unaddressed.

14 *THE COURT:* Did they subsist in the negligence, that
15 the panel expressly found that?

16 *MR. HARVIN:* I'm sorry, Your Honor?

17 *THE COURT:* That Smith Barney had negligently behaved
18 and had violated its own compliance procedures?

19 *MR. HARVIN:* No, that argument -- that argument was
20 raised in this part of the proceeding, but when you look at the
21 compliance manual, the compliance manual specifically states
22 that a review or a signature comparison is necessary with
23 respect to those examples in which there was a change in
24 ownership. And the example cited in the compliance manual,
25 such as -- what was it? It was from a joint to a sole account.

1 It's completely opposite of what occurred here, because the --
2 one of the joint members, a Mary Jones and a John Jones, if you
3 transferred it to John Jones, Mary Jones loses ownership. Here
4 it was from Mary Jones' IRA account to a joint account over
5 which she had signatory and control. And that was the policy
6 to which Ms. Mouser testified, and that is, there was no need
7 to do a signature comparison with a new account form because
8 there was not a change of ownership.

9 And I would also point out there was no evidence
10 presented at the hearing that that was in any way different
11 from the standard practice in the industry.

12 *THE COURT:* Well, a firm's own compliance standards do
13 not create obligations to third parties. That's an internal
14 operating procedure that is designed to make sure they don't
15 have these kinds of problems. Walmart's operating procedures
16 do not set the standard for slip and fall cases. Texas law
17 does that. And is negligence even an issue in the -- if you
18 pay a fraudulent check, you're liable, right?

19 *MR. HARVIN:* The lack of ordinary care is an issue
20 potentially under 4.406 of the Commerce Code. If the customer
21 gives adequate notice, then the bank pays for that check which
22 was unauthorized within 30 days preceding that notice.
23 However, if the plaintiff proves that there was a lack of
24 ordinary care on behalf of the bank or Smith Barney, then 4.406
25 requires the fact finder to allocate proportional

1 responsibility between the plaintiff's fault, if you will, and
2 the bank's fault.

3 *THE COURT:* I guess I mostly had them immediately.

4 *MR. HARVIN:* I'm sorry, Your Honor?

5 *THE COURT:* I mostly had immediate objections, I
6 guess.

7 *MR. HARVIN:* Your Honor, we found -- the settlement
8 agreement, for the Court's reference, is Respondent's Exhibit
9 38 at Docket No. 7.

10 *THE COURT:* Do you have it there?

11 *MR. HARVIN:* No, we do not.

12 *THE COURT:* Okay. All right. Let's take a ten-minute
13 recess.

14 *(Recess from 10:58 a.m. to 11:08 a.m.)*

15 *THE COURT:* Thank you. Be seated.

16 All right. Mr. Harvin, I'm going to deny your
17 motions for sanctions without prejudice. They probably ought
18 to be carried with the rest of the case about abusive tactics,
19 to the extent that the pleadings misstate the facts, that will
20 bear both on whatever opportunities for post-judgment relief
21 there are and, of course, has some bearing on the merits of
22 this case, because if the case stated by one side is not
23 supported by the record, then that lends support to the other
24 side. But I'm going to throw it in the mix and proceed like
25 that. But Smith Barney having pointed out the inconsistencies

1 and having procured the retraction of several has been useful.

2 We have the pending motion to append and I'm
3 going to address that just as soon as I can, which will be
4 about a week.

5 Anything else, Mr. Sparks?

6 *MR. SPARKS:* No, Your Honor.

7 *THE COURT:* Mr. Harvin?

8 *MR. HARVIN:* No, Your Honor.

9 *THE COURT:* Oh, one more, and that reference is not
10 right. We've now printed eight reams of stuff and didn't get
11 it. So, would -- since you're here, Mr. Harvin, would you
12 please favor us with a courtesy copy of the transcript other
13 than -- we have three transcripts. Is there more than that?

14 *MR. HARVIN:* No, that's all.

15 *THE COURT:* Those three. Okay. So, I have those
16 handy, but the --

17 *MR. SPARKS:* I can easily provide the Court with a
18 copy of the property settlement agreement today, if you would
19 like me to do that, by fax.

20 *THE COURT:* If you have a copy but --

21 *MR. SPARKS:* I don't have one with me, but I can have
22 my office send one to you, Your Honor. I can file it.

23 *THE COURT:* No, don't file it.

24 *MR. HARVIN:* Judge, we just called our office to go
25 back and have somebody pull it.

1 THE COURT: Okay. Well, either one of you can e-mail
2 it as an attachment to my case manager. I don't want to file
3 it. I want to be able to print it on my own machine myself
4 without going into the record. There was some muttering by the
5 old clerk, not the young clerk, about that's the downside of
6 electronic filing. No, it was just as hard to find them in the
7 file when you had paper files that were 8 inches thick and
8 perhaps misindexed by us, perhaps by you, and sometimes by all
9 of us. And the advantages of electronic filing are phenomenal
10 for everybody, except you-all write docket entries even worse
11 than docket clerks did. Y'all capitalize them unnecessarily.
12 No all caps. Simplify them. The computer cuts it off after --
13 you know, when you're looking for stuff, it truncates
14 especially like party names. If it says so-and-so doing
15 business as and all that, it shouldn't be in the caption
16 anyway, but it just keeps me from being easily able to see what
17 the rest of the parties are. So, help us, please.

18 All right. Thank you, counsel.

19 MR. HARVIN: Thank you.

20 (Concluded at 11:26 a.m.)

21 * * *

22 I certify that the foregoing is a correct transcript from the
23 record of proceedings in the above-entitled cause, to the best
24 of my ability.

25 /s/ Kathy L. Metzger
Kathy L. Metzger
Official Court Reporter

11-1-10
Date